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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

HILDEBERTO DIAZ MORALES,

Defendant and Appellant.

2d Crim. No. B211564
(Super. Ct. No. 2006042933)
(Ventura County)

Hildeberto Diaz Morales was convicted after a court trial of 12 counts of lewd acts on a child under 14 years old. (Pen. Code, § 288, subd. (a).)¹ The court further found that all but three of the counts involved substantial sexual conduct pursuant to section 1203.066, subdivision (a)(8). The trial court sentenced Morales to 10 consecutive and two concurrent 15-year-to-life terms under the multiple victim provision of the one strike law. (§ 667.61.)

On appeal, Morales raises ex post facto challenges to his sentence. The Attorney General concedes. We remand for resentencing.

FACTS

For many years, Morales lived with a woman named Joy. T., Joy's daughter from a previous relationship, and S., Joy's niece, lived in the same household.

¹ All statutory references are to the Penal Code.

Counts 1 through 4

S. was eight years old and in the third grade during the 2005-2006 school year. S. saw an educational video at school about child molestation. After seeing the video, she reported to her older sister that Morales had put his hands down her pants. S.'s sister reported the complaint to her father who called the police.

S. said Morales molested her a year earlier during the 2004-2005 school year when she was in second grade. On separate occasions, Morales rubbed over her vagina under her panties; put his finger inside her vagina; rubbed his penis against her vagina; and kissed her, putting his tongue in her mouth.

Counts 5 through 12

S.'s cousin, T., also testified Morales molested her. T. was 25 years old at the time of the trial in August 2008.

When T. was in the third grade she awoke to find Morales half on top of her. He pulled up her nightgown and rubbed her vaginal area. Then he forced her legs open and put his fingers in her vagina. On another occasion, when T. was in the third grade, she awoke to find Morales touching one breast and licking the other. Also, when T. was in the third grade, she walked into a bathroom Morales was using. He made her rub his exposed penis.

When T. was 10 or 11 years old in the fifth grade, Morales sat down on the bed where she was sleeping, and placed his fingers inside her vagina.

When T. was age 11 or 12 in the seventh grade, she was in her mother's bedroom. Morales came in and locked the door. He pulled her legs apart and put his fingers inside her vagina. Then he removed her T-shirt and fondled and sucked on her breasts. He got up to be sure the door was locked. He returned to the bed and placed T.'s hand on his penis. He pushed her underwear aside and inserted the tip of his penis in her vagina.

DISCUSSION

I

Morales contends the trial court's imposition of one-strike terms on counts 5 through 12 violates his constitutional right against an ex post facto application of the law. The Attorney General concedes.

The ex post facto clauses of the United States and California Constitutions prohibit the imposition of greater punishment than what was authorized when the crime was committed. (U.S. Const., art. 1, § 10; Cal. Const., art. 1, § 9; *People v. Alford* (2007) 42 Cal.4th 749, 755.) Here Morales was sentenced under section 667.61, known as the one strike law. The effective date of section 667.61 is November 30, 1994. (*People v. Hiscox* (2006) 136 Cal.App.4th 253, 257.) The prosecutor has the burden of establishing that the crimes were committed on or after the effective date of the section. (*Id.* at p. 260.) In the absence of special findings, the verdicts are insufficient to establish the date of the offenses unless the evidence leaves no reasonable doubt that the offenses occurred on or after November 30, 1994. (*Id.* at p. 261.)

The last molestations about which T. testified occurred when she was in the seventh grade. T. was born on October 3, 1982, began kindergarten when she four years old, and graduated from high school in 2000 without having skipped or repeated a grade. That places her in the seventh grade in 1994. The Attorney General concedes, however, there is no evidence that establishes beyond a reasonable doubt that the offenses occurred on or after November 30, 1994. Thus we must remand for resentencing under the law as it existed prior to the effective date of section 667.61 for counts 5 through 12.

II

Morales contends there is a different ex post facto violation as to counts 1 through 4. The trial court believed that no probation could be granted for those counts.

Until September 20, 2006, section 667.61, subdivision (c)(7) allowed for probation if the defendant qualified under section 1203.066, subdivision (c). Under

section 1203.066, subdivision (c), as it existed until December 31, 2005, the court could grant probation if it found the defendant was a member of the victim's household, grant of probation was in the best interest of the victim, the defendant was amenable to rehabilitation, and there would be no threat of physical harm to the victim.

Section 667.61 was amended effective September 20, 2006, to eliminate the possibility of parole. (§ 667.61, subd. (h).) Similarly, effective January 1, 2006, section 1203.066 was amended to eliminate the possibility of parole for the offenses of which Morales was convicted. (*Id.*, subd. (a)(8).)

Morales argues, and the Attorney General concedes, the evidence does not show beyond a reasonable doubt that Morales committed the offenses charged in counts 1 through 4 on or after January 1, 2006. The Attorney General further concedes that a party asserting an ex post facto challenge need not show he would have received a lesser punishment under the prior law. (*People v. Delgado* (2006) 140 Cal.App.4th 1157, 1167.) Thus we must remand for the trial court to consider probation under the prior law.

III

Morales contends the trial court was unaware of its discretion to sentence him concurrently.

Both the prosecutor and the probation department told the trial court that section 667.61 requires consecutive sentences.

Section 667.61, subdivision (i) requires consecutive sentences for offenses specified in paragraphs (1) through (7) of subdivision (c). A violation of section 288, subdivision (a) is specified in paragraph (8) of subdivision (c). Thus a concurrent sentence is not expressly prohibited. Absent an express statutory prohibition on concurrent sentences, section 669 gives the trial court discretion to impose concurrent or consecutive sentences. (*People v. Rodriguez* (2005) 130 Cal.App.4th 1257, 1262.) Thus here the trial court has such discretion.

Nothing in this opinion should be construed as indicating how the trial court should exercise its discretion.

The sentence on all counts is reversed and the matter remanded for resentencing. In all other respects, the judgment is affirmed.

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GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Allan L. Steele, Judge

Superior Court County of Ventura

Richard E. Holly, under appointment by the Court of Appeal, for
Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief
Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General,
Scott A. Taryle, Supervising Deputy Attorney General, Stephanie A. Miyoshi, Deputy
Attorney General, for Plaintiff and Respondent.